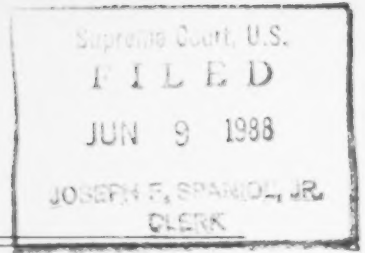


No. 87-1685



IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OIL COMPANY,
Petitioner,

vs.

CITY OF SANTA MONICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I.

The City Draws A Specious Distinction Between Volumetric User Fees And Fixed User Fees In Arguing That The Decision Below Does Not Conflict With Decisions Of This Court Or Any Federal Court Of Appeals And That No Material Issue Of Fact Remains To Be Tried.

The City draws a specious distinction between user fees dependent upon the volume of commerce passing through Santa Monica and the user fee based on the square footage of land used in connection with the Shell pipeline. The City correctly admits that the former type of user fee may violate

the Commerce Clause but erroneously concludes that the latter type does not. The City insists that this is so even if the square footage is multiplied not by the value of the land used but by the value of other land not shown to be used and not shown to be comparable in value to the land used. Apparently respondents believe a fixed user fee passes Commerce Clause muster so long as the square footage element of the formula is accurate. It makes no difference, according to the City, that the other half of the formula is nonsense.

The City thus argues that the amount of the fixed franchise fee is irrelevant. According to the City, all that counts is the formula. This argument is absurd. To begin with, it is absurd to say that a formula which multiplies square footage used times value per square foot is a valid formula so long as the square footage side of the equation is correct even though the value side of the formula is arbitrary and totally unrelated to the value of the land to which the formula is being applied. Next, it is absurd to say that the total amount of the fixed user fee is irrelevant. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707, 716-717, 31 L.Ed.2d 620, 92 S.Ct. 1349 (1972), the court clearly held that while user fees must be based upon a:

“... ‘[U]niform, fair and practical standard’ relating to public expenditures, *it is the amount of the tax, not its formula, that is of central concern.* At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster,” [Emphasis added.]

The City’s *amici* try to justify the amount of the fee by arguing that cities need to generate revenue and that cities

have possible liability in the event of pipeline rupture. These justifications are not well taken.

First, the cities' political inability to raise taxes from the local citizenry is not a valid reason for increasing user fees on interstate commerce. We have discussed this in section I of cross-respondent's brief in opposition to the City of Santa Monica's cross-petition for writ of certiorari in Case No. 87-1841 (filed contemporaneously herewith). We incorporate those comments here by reference.

Second, as to the *amici's* claim that the franchise puts them at financial risk, we merely point out that the franchise fee should reflect the costs incurred and benefits conferred by the City. To determine this requires a trial on a factual issue in the Federal District Court. That trial was denied to Shell when the trial court granted the City's motion for summary judgment on the theory that the City was free to charge any amount it wanted without Commerce Clause scrutiny. Had the case gone to trial on that issue, Shell would have demonstrated that the user fee is excessive in comparison to the costs incurred and benefits conferred by the City. For instance, Shell would have demonstrated that the proposed franchise contains numerous provisions which make Shell, not the City, directly responsible for maintenance, repair, insurance, relocation, indemnification and any loss incurred as a result of Shell's operation of the pipeline in Santa Monica. C.R. 92:31-40. A copy of the proposed franchise is reproduced as Appendix G to this Reply Brief. Therefore, it seems clear that any costs which accompany the presence of the pipeline fall on Shell — not on the City of Santa Monica.

Furthermore, Shell would have demonstrated the obvious — that the value of lands abutting the streets is not the same as the value of lands in the streets. The latter lands are restricted to street use; the former are not so restricted. All

other things being equal, restricted lands obviously carry a lower market value than unrestricted lands.¹

II.

In Arguing That The Case At Bench Does Not Raise An Important Unresolved Question Concerning Discrimination Against Interstate Commerce And That No Issue Of Fact Remains To Be Tried, The City Erroneously Focuses On The Commodity Carried By The Pipeline Rather Than The Use Which The Pipeline Makes Of The Streets.

The City of Santa Monica implicitly concedes that two public utilities serving Santa Monica make the same use of the city streets as does Shell. The City also implicitly concedes that the local public utilities are in a position to pass local user fees onto the local citizenry in their rates but that Shell is not able to do so. Lastly, the City implicitly concedes that the City is charging the Shell pipeline approximately 59 times more per mile for its use of the city streets than the City charges the two utilities for their similar use. According to the City, the foregoing facts — *as a matter of law* — would not permit a finding of discrimination against interstate commerce because (1) Shell has allegedly not shown that the source or destination of its oil has any relevance to the City's user fee arrangements and (2) that the two local utilities are also

¹ Shell did not submit an affidavit to this effect in the trial court at the hearing on summary judgment because, as we point out in section III of our petition for writ of certiorari, the statements of genuine issues of material fact filed by *both* parties conceded that if the City was subject to Commerce Clause scrutiny, the fair market value issue would have to be tried.

engaged in interstate as well as local business. Therefore, the City says, if this be a case of discrimination, it is a case of discrimination against interstate commerce in favor of interstate commerce rather than discrimination against interstate commerce in favor of local commerce.

These two arguments are invalid. First, Shell has demonstrated that the two subsurface users who deliver locally and are, therefore, in a position to pass on their user fees to the local voters, are charged low per mile user fees. On the other hand, the Shell pipeline, which does not deliver locally but merely passes through, cannot pass its user fee on to the local voters and is required to pay 59 times more for a nearly identical use of the streets. This demonstrates that the destination of Shell's oil *does* have a relevance to the City's user fee arrangement. At the very least, it ought to be a sufficient showing to survive a motion for summary judgment on the issue. If it is not, cities will be free to practice a particularly pernicious form of concealed discrimination against interstate commerce.

The City's second argument is equally erroneous. It is directly contrary to the holding of this Court in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977). There, this Court determined that unreasonable discrimination against interstate commerce conducted out-of-state and in favor of interstate commerce conducted within the state violates the Commerce Clause. In the case at bench, the City has discriminated against interstate commerce that is passing through and in favor of interstate commerce conducted within the City.

CONCLUSION

For all of the reasons set forth in this Reply Brief, Shell's Petition for Writ of Certiorari, and the Brief Amicus Curiae of the Western Oil and Gas Association, et al., Shell Oil Company respectfully requests that a writ of certiorari issue to correct the decision of the United States Court of Appeals for the Ninth Circuit.

DATED: June 9, 1988

Respectfully submitted,

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APPENDIX G



DECLARATION OF RICHARD KERICK

I, RICHARD D. KERICK, declare:

1. I presently hold the position of Senior Staff Land Agent of the West Coast Division (Pipelines) - Products of Shell Oil Company. In May of 1982 I held the position of Staff Land Agent of said Division. As Staff Land Agent, my job responsibilities included participating on Shell's behalf in negotiations between Shell and the defendant City of Santa Monica concerning the terms of a long-term renewal franchise agreement to replace the pipeline franchise between Shell and the City which expired on May 8, 1981.

2. On May 18, 1982 I personally met with Mr. Robert Myers and Ms. Carol Korade, both of the Office of the Santa Monica City Attorney, to discuss a renewal franchise. At that meeting Mr. Myers gave me a draft copy of a proposed renewal franchise ordinance, a copy of which is attached hereto as Attachment "A."

3. The aforementioned proposed franchise ordinance (Attachment "A") is the most recent franchise proposal tendered to Shell by the City.

4. The facts set forth above are known to me to be true, of my personal knowledge. I am competent to testify to such facts, and if called as a witness, I could and would so testify.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18 day of April, 1986 at Los Angeles, California.

/s/ RICHARD D. KERICK

CA:RMM:CAK:se

City Council Meeting

Santa Monica, California

ORDINANCE NUMBER _____

(City Council Series)

AN ORDINANCE OF THE CITY OF SANTA MONICA GRANTING A FRANCHISE TO SHELL OIL COMPANY TO OPERATE, MAINTAIN, INSPECT, REPAIR, REMOVE AND ABANDON A PIPELINE AND APPURTENANT FACILITIES IN CERTAIN PUBLIC STREETS OF THE CITY OF SANTA MONICA

THE CITY COUNCIL OF THE CITY OF SANTA MONICA ORDAINS AS FOLLOWS:

SECTION 1. *Interpretation of Franchise.*

(a) The word "grantee" shall mean the Shell Oil Company, a Delaware Corporation, to which the franchise is granted by this Ordinance as well as its lawful successors or assigns.

(b) The words "City" shall mean the City of Santa Monica, a municipal corporation duly organized and validly existing under the general laws of the State of California with corporate power to carry on its business as it is now conducted under the statutes of the State of California and the Charter of the City.

"Attachment "A"

(c) The word "use" shall mean to operate, maintain, inspect, repair, remove, and abandon a pipeline system together with all manholes, valves, appurtenances and service connections therewith and necessary and convenient for operation of the pipeline in, under, along and across certain public streets (hereinafter collectively referred to as "highways") located in City, described as follows:

On Twenty-sixth Street from the Northwesterly boundary of the City of Santa Monica to Colorado Avenue; thence on Colorado Avenue to Cloverfield Boulevard; thence on Cloverfield Boulevard to Ocean Park Boulevard; thence on Ocean Park Boulevard to Twenty-third Street; thence on Twenty-third Street to Dewey Street; thence on Dewey Street to Twenty-fifth Street.

(d) The word "franchise" or "franchise property" shall mean this franchise to use a pipeline system in those streets set forth in subsection (c) of this Section.

SECTION 2. *Grant of Franchise.*

The right, privilege and franchise, subject to each and all terms and conditions contained in this Ordinance to continue to use the existing pipeline for the purpose of transporting petroleum, oil, and liquid hydrocarbon products thereof and gas in those streets contained in Section 1(c) is hereby granted to grantee pursuant to the Santa Monica Municipal City Charter Section 1600.

SECTION 3. *Term of Franchise.*

This franchise shall be for a term of 10 years from the effective date of this Ordinance; however, the said franchise may be sooner terminated by voluntary surrender or abandonment by grantee, or by exercise of the power of eminent domain, by forfeiture for noncompliance with the terms and provisions hereof, by operation of any term or condition, hereof, or in the event that any provisions hereof

becomes invalid or unenforceable and the City Council expressly finds that such provisions constituted a consideration material to this Ordinance.

SECTION 4. *Compensation to the City.*

(a) Grantee shall pay to the City a fixed quarterly franchise fee of \$59,250.00 on January 1, April 1, July 1 and October 1 of each year during the term of this franchise.

(b) Grantee shall pay City upon acceptance of the franchise, the sum of \$253,724.00 as set forth in the Agreement entered into between the grantee and the City on June 16th, 1981, Contract Number 3654 (CCS), to cover franchise payments through June 30, 1982.

(c) The compensation provided for in Section 4(a) shall be subject to an increase on July 1, 1983, and each subsequent year during the term of this franchise ("adjustment date"). The amount of increase shall be the higher of the amount computed pursuant to the Wholesale (Primary Market) Price Index for Crude Petroleum and the Consumer Price Index for All Urban Consumers which shall be computed in the following manner:

(1) Wholesale (Primary Market) Price Index for Crude Petroleum.

The base for computing the adjustment is the Wholesale (Primary Market) Price Index for Crude Petroleum, published by the United States Department of Labor, Bureau of Labor Statistics ("Index"), which is published for the month nearest the date of the commencement of the term of this Ordinance ("Beginning Index"). If the Index published nearest the adjustment date ("Extension Index") has increased over the Beginning Index, the franchise fee for the following year (until the next adjustment) shall be set by multiplying the quarterly franchise fee set forth in Section 4(a) by a fraction, the numerator of which is the Extension Index and the denominator of which is the Beginning

Index. In no case shall this increased compensation be less than the franchise fee set forth in Section 4(a). If the Index is discontinued or revised during the term, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

(2) Consumer Price Index for All Consumers. The base for computing the adjustment is the Consumer Price Index for All Urban Consumers, published by the United States Department of Labor, Bureau of Labor Statistics ("Index"), which is published for the month nearest the date of the commencement of the term of this franchise ("Beginning Index"). If the Index published nearest the adjustment date ("Extension Index") has increased over the Beginning Index, the franchise fee for the following year (until the next adjustment) shall be set by multiplying the quarterly franchise fee set forth in Section 4(a) by a fraction, the numerator of which is the Extension Index and the denominator of which is the Beginning Index. In no case shall this increased compensation be less than the franchise fee set forth in Section 4(a). If the Index is discontinued or revised during the term, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised.

(d) The franchise fee specified in this Section shall in no way limit grantee's obligation to compensate City or any private citizen for any damage, claim, expense or loss whatsoever as set forth in this Ordinance.

(e) *Compensation For Repair Work.* Grantee shall pay to the City on demand, the cost of all repairs to public property made necessary by any operation of the grantee under this franchise.

(f) *Compensation For Abandonment or Removal.*

(1) In the event grantee's abandonment of the pipeline with the approval of the City, the grantee shall pay to the City a fee which shall be computed as follows:

<u>Pipesize In Inches</u>	<u>Fee In Dollars Per Lineal Foot</u>
00 - 10	\$ 15.00
11 - 18	\$ 22.00
over 18	\$ 28.00

(2) The fee computed above shall be the minimum fee to be charged the applicant for the privilege of abandoning those facilities in place which the City determines to be in the public interest. Should the City determine that the Construction Cost Index published by McGraw-Hill, Inc. in the Engineering NewsRecord for the last calendar month immediately preceding the effective date of the abandonment application stand at the other than 3,371.49 (which is the Construction Cost Index for January 15, 1981, using prices prevailing during the year 1913, as a base of 100), then the fee to be charged for said abandonment in place shall be increased from the minimum fee established by the City in direct proportion as said index for said calendar month for construction costs exceeds 3,371.49.

(3) If McGraw-Hill, Inc. shall discontinue the publication of a construction cost index using prices prevailing in the year 1913, as a base of 100, and if no transposition table prepared by McGraw-Hill, Inc. is available so as to make those statistics which are then available applicable to the year 1913, then the City shall prescribe a rate of payment which shall, in its judgment, vary from the hereinabove specified minimum rates in approximate proportion, as construction costs then current vary from said Construction Cost Index last published.

Upon this point, such determination by the City shall be final and conclusive.

(4) The City may also specify other conditions to abandonment, including but not limited to, removal as set forth in Section 18 herein. Such conditions shall be fully complied with to the satisfaction of the City before such facilities shall be considered abandoned. Until so abandoned, franchise fee payment shall continue to accrue.

(g) *Interest.* Any payment due from grantee to City under any provision of this Ordinance which is not paid when due shall bear interest at the highest amount allowable by law, but the payment of such interest shall not excuse or cure any default by grantee under this Ordinance. Such interest is separate and cumulative and are in addition to and shall not diminish or represent a substitute for any or all of City's rights or remedies under any other provision of this Ordinance.

SECTION 5. *Insurance.*

Grantee at all times during the term of this Ordinance and until the abandonment of the pipeline shall maintain liability insurance in an amount not less than \$20,000,000.00 cover any claim, expense, or loss arising out of the operation, use, maintenance or other privilege exercised under this Ordinance, including grantee's contractual liability to indemnify City. The City, boards and commissioners, its officers, employees, agents and servants shall be named as additional insureds in said policy of insurance for all operations of grantee relating to the operation of said pipeline within the City. Said policy of insurance shall contain the following provisions or endorsements:

(a) The naming of an additional insured shall not affect any recovery to which such additional insured would be

entitled under this policy if not named as such additional insured.

(b) An additional insured named herein shall not be held liable for any premium or expense of any nature on this policy or any extension thereof.

(c) The provisions of the policy will not be changed, suspended, cancelled or otherwise terminated as to the interest of an additional insured named herein without first delivering to City thirty (30) days written notice of such intention.

(d) Any other insurance held by an additional insured shall not be required to contribute anything toward any loss or expense covered by the insurance provided by this policy.

(e) Grantee shall furnish to City a Certificate of Insurance showing insurance as herein required and if said certificate is not filed, grantee agrees that this Ordinance can be set aside.

SECTION 6. *Surety Bond.*

Within five (5) days after the effective date of this Ordinance, grantee shall file and thereafter at all times during the term of the Ordinance keep on file with the City Clerk a corporate surety bond running to the City, in the sum of \$50,000.00, conditioned that grantee shall well and truly observe, fulfill and perform each condition of this Ordinance. In case of any breach of condition of the bond, the whole amount of the sum shall be deemed to be liquidated damages and shall be recoverable from the principal and sureties of the bond. If said bond is not filed within five (5) days after the effective date of the Ordinance, the Ordinance may be set aside.

SECTION 7. *Maintenance and Repair.*

(a) Grantee shall maintain the pipeline and appurtenances in a good, workmanlike manner and in conformity with all the ordinances, rules and regulations now or

hereafter adopted or prescribed by the City and shall perform any necessary repairs.

(b) Grantee shall conduct maintenance and repair of all pipes and pipelines with the least possible hindrance to the use of the highways for purposes of travel, and as soon as such work is completed, all portions of the highway which have been excavated or otherwise damaged thereby shall be placed in as good condition as the same were before the commencement of such work, to the satisfaction of the City, and any damage or injury suffered by any person by reason of any excavation or obstruction being improperly guarded during said work shall be borne by grantee.

(c) Grantee, upon completing any street opening, shall restore all streets, highways, private and public property to at least as good condition as the same existed in, immediately prior to said opening, and does by this Ordinance, guarantee that the work of restoration shall be good against all faulty workmanship and materials and shall, for a period of one (1) year thereafter, maintain all such road surfaces in as good condition as other portions of said road, not disturbed by said opening.

(d) Grantee shall make such deposits of money or shall file such bonds with the City as may be required to insure satisfaction and completion of all construction activity within public rights of way.

SECTION 8. *Safety Requirements.*

The City Council finds that the public health, safety and welfare require that certain safety requirements be imposed as a condition of granting this franchise. Without these requirements, the City Council finds that granting a franchise would be contrary to the public health, safety and welfare and that the City Council would be required to deny the franchise. As a condition of the City granting this

franchise, grantee shall perform all of the following safety requirements:

(a) *Maps of Pipeline Block Valves and Other Devices.* The grantee will provide the City fire department a map or suitable diagram showing the location along the pipeline of all block valves or other mechanical devices situated along the pipeline so that the fire department can locate each valve or device in order to stop the flow of the pipeline manually.

(b) *Pipeline Operation and Contingency Planning.* The grantee shall provide the City fire department a pipeline operations contingency plan covering all of the following:

(1) The procedures for conducting normal operations and maintenance activities and the approved means to handle abnormal operations and emergencies.

(2) The construction and repair record and for the pipeline.

(3) Its liason procedure with City fire, police, and other emergency authorities for emergency response, including the means of communication and the means of preventing the ignition of vapors released in a pipeline rupture.

(4) The personnel training procedures for firefighters and emergency equipment use.

(c) *Maintenance of Studies.* The grantee shall compile and maintain a study of the pipeline within the boundaries of the City showing all of the following:

(1) Pipeline route through its boundaries.

(2) Populations density along the pipeline route.

(3) Soil and other geologic conditions along the pipeline route

(4) A means of educating and reporting to the public concerning the potential hazards in transporting petroleum by pipeline.

(d) *Specifications.* The pipe, repaired pipe and replaced sections and other components of the pipeline to exist to be placed in streets as franchise property shall be designed, manufactured and installed in accordance with the Pipeline Code. The operating or service pressure for which they are designed will be the maximum non-shock internal pressure that may occur either under conditions of year-round operation of under static conditions with the pipeline filled but no fluid flow.

Steel pipe to be in contact with the ground or in casing across freeways, streets, and storm drains shall be covered with a coating or wrapping and be equipped with a cathodic protection system to minimize corrosion and electrolysis.

(e) *Pressure Limitations.* No point in the pipeline constituting franchise property shall be subject to an internal pressure at any time from any cause whatsoever in excess of that permitted by the Pipeline Code for testing purposes; or except when under pressure test, in excess of either the pressure to which it was referred to in subsection (e) thereof, or 66.6% of the pressure to which it was subject under the previous pressure test conducted pursuant to the provisions of subparagraph (g) hereof. No pressure in the line during surges or other variations from normal operations shall exceed 110 percent of the maximum operating pressure.

(f) *Pressure Tests.* After repair or replacement of any pipe pursuant to the terms of this Ordinance, the affected portion of the pipeline between sectionalizing valves shall be subjected to a pressure test as provided hereof and within the pressure limitations prescribed hereof not more than thirty days after completion of the work; provided,

however, that no such test is required for a minor repair which does not require removal of the pipeline from operation.

The pipeline shall not be operated beyond the expiration of a twelve (12) month period of time following such pressure test thereon.

After a severe earthquake, explosion in close proximity to the pipeline, landslide or other serious earth movement, and other activity that may cause undetected damage where the integrity of the line is in doubt by the grantee, the pipeline shall be subjected to a pressure test as provided hereof and within the pressure limitations prescribed in subsection (f) and hereof not more than thirty days after incident.

After a survey by an inspection pig if some event occurred that gave evidence of pipe damage, the pipeline shall be subjected to the pressure test as provided hereof and within the pressure limitations.

The pressure test shall be a hydrostatic test that conforms to 49 C.F.R Part 195.302(e). Pressure test shall not show an hourly loss, in excess of ten (10) gallons.

The City may prescribe any reasonable test method, witness the entire test procedure, and, during a test or at any other time, measure or ascertain the pressure to which the pipe is subject.

The pipeline authorized by this franchise shall be subjected to a pressure test by the grantee whenever reasonably required by the City.

The grantee shall submit to the City reports of pressure tests made pursuant to the provisions of this franchise, showing the date of test, description of portion of pipeline tested, identified with respect to City street routes, and test data sufficient in detail to permit analysis of test results and determination of compliance with provisions of this Section 8.

(g) *Electro-Magnetic Survey Inspection.* The pipeline shall be subjected to an electro-magnetic survey the complete length of the line within the City boundary. The survey shall be carried out using a magnetic flux type inspection pig or equivalent device.

The pipeline shall not be operated beyond the expiration of a twelve (12) month period of time unless a survey is completed. Subsequent surveys will be dependent upon the results of the initial survey. If minor wall thinning and no serious defects are found, an electro-magnetic survey would not be required until (ten) 10 years after the initial survey. If significant wall thinning and/or other defects are found, the electro-magnetic survey shall be repeated every four years.

The grantee shall submit to the City reports of this electromagnetic survey test pursuant to the provisions of this franchise, showing the data of test, description of portion of pipeline tested, identified with respect to City street routes, and test data sufficient in detail to permit analysis of test results and determination of compliance with provisions of this subsection (h).

(h) *Thickness Measurement.* The grantee shall conduct thickness measurements where there is reason to believe that the pipe wall is being reduced due to external/internal corrosion (e.g., the effect of solid particles in the transported fluid).

(i) *Leak Detection.* The grantee shall be equipped with a means of leak detection with remote access monitoring of automatic nature and continuous operation. The leak detection system should be at least as good as the leak detection system sensitivity in effect on the line at the present time. The leak detection system or improved version thereof shall provide short-term (i.e. minutes) and long-term (i.e. hourly, daily) leak monitoring and alarms.

(j) *Calibration of Dynamic Model Computer Program.* The grantee shall provide at intervals not exceeding one year, conclusive test verification of the leak detection resolution and leak pinpointing accuracy of dynamic model computer program. The specific test will be dictated by the grantee. The grantee shall submit to the City reports of the calibration.

(k) *Corrosion.* The grantee shall provide at intervals not exceeding six months, conclusive test verification of the condition of sections of the line at casings and in environments (i.e. near water storage, etc.) where increased corrosion is possible.

(l) *Valve Spacing.* A motor operated block valve north of the San Vicente Reservoir, upstream from the top of the hill, approximately 1000 feet from the reservoir shall be added.

(m) *Valve Operations.* All block valve shall be remotely operated and motor controlled.

(n) *Remote Operation and Display of Valves.* Redundant, remote operation of sectionalizing block valves that are continually visually displayed at the supervisory control room computer display shall be used.

(o) *Chemical Monitoring.* The City reservoir and water wells shall be protected from contamination by frequent chemical monitoring of the hydrocarbon content of all water reservoirs and water wells in the City within 0.3 miles of the pipeline.

(p) *Inspecting Surface Condition on or Adjacent to the Pipeline Right-of-Way.* The grantee shall at intervals not exceeding 1 week, inspect the surface condition on or adjacent to the pipeline right-of-way in the City.

(q) *Leak Location and Pinpointing.* Adequate facilities (such as a portable hydrocarbon detector, passive acoustic monitoring, etc.) shall be provided to pinpoint the leak along

the line after a leak is suspected by remote access monitor of automatic nature, visual observations or other means.

(r) *Pipeline Replacement.* The grantee shall replace the pipeline if it has deteriorated to such a point, in any part, that maximum allowable operating pressure is 80% or less than the test pressure.

(s) *Annual Certification.* The grantee shall annually file with the City a certificate under penalty of perjury that the grantee has complied with all of the requirements of 49 C.F.R. Part 195 and all other applicable federal, state and local regulations including this Section 8.

SECTION 9. *Pipeline Accidents.*

If any portion of any highway shall be damaged by reason of breaks or leaks in any pipe or conduit constructed under this Agreement, grantee thereof shall, at its own expense, repair any such damage and put such highway in as good condition as it was in before such break or leak, to the satisfaction of the City.

SECTION 10. *Indemnification of City.*

(a) Grantee shall indemnify and hold harmless the City, boards and commissions, its officers, employees, agents and servants from and against any and all loss, damages, liability, claims, suits, costs and expenses, whatsoever, including reasonable attorneys' fees, regardless of the merit or outcome of any such claim or suit, arising from or in any manner connected to the activities or work conducted pursuant to the franchise.

(b) Grantee shall indemnify, defend and save harmless the CITY, boards and commissions, its officers, employees, agents and servants from and against any and all claims and losses whatsoever, including reasonable attorneys' fees, accruing or resulting to any and all persons, firms or corporations furnishing or supplying work, services, materials, equipment or supplies in connection with

activities or work conducted or performed pursuant to this Ordinance and arising out of such activities or work, and from any and all claims and losses whatsoever, including reasonable attorneys' fees, accruing or resulting to any person, firm or corporation for damage, injury or death arising out of Grantee's operations.

SECTION 11. *Liability of Grantee.*

Grantee shall be strictly liable for any and all loss or damage to City, its officers, boards and commissions, employees, agents and servants, private parties and property owners in the City caused by the operations, activities or work conducted pursuant to this Ordinance.

SECTION 12. *Relocation of Pipeline Upon City's Request.*

Grantee shall relocate without expense to the City any facilities installed, used, or maintained under this franchise if and when necessary or accommodate the construction of any public street, highway, alley or other public improvement.

SECTION 13. *Emergency Crews and Equipment.*

Grantee shall maintain on a twenty-four (24) hour basis adequate emergency equipment and properly trained emergency crews within a radius of twenty-five (25) miles from any facilities installed or maintained pursuant to this Ordinance, for the purpose of shutting off pressure and flow and cleaning up the spilled contents of such facilities in the event of an emergency resulting from an earthquake, in an act of war, civil disturbance, flood, or other cause. On or before the acceptance date of this Ordinance, grantee shall present to City an emergency plan listing equipment, personnel and procedures to be used in an emergency. Grantee shall immediately inform City of any changes in or revisions of the emergency plan that occur during the term of this Ordinance and shall submit an amended plan to the

City. Grantee shall provide City with a method of instantaneous communication to emergency crew center which shall be to the mutual satisfaction of City and grantee. Grantee shall annually present to City an updated emergency plan listing equipment, personnel and procedures to be used in an emergency and provide City with a method of instantaneous communication to emergency crew center.

SECTION 14. *City's Reserved Rights.*

(a) The granting of this Ordinance or any of the terms or conditions contained herein shall not be construed to prevent to the City from granting over the route herein specified or elsewhere any identical, similar, or other type of franchise to any person, firm, or corporation other than grantee.

(b) The City reserves the right to improve any highway, street, alley or other public place in portion thereof over and within which this franchise is granted, including the widening, change of grade, construction or reconstruction of such highway, street, alley, or other public place or portion thereof, and there is further reserved to the City and any political subdivision or district within the City, the right to construct, reconstruct, install, repair and maintain in any such highway, street, alley, or other public place or portion thereof, any public improvement.

(c) The City reserves the right to give the grantee any directions for the maintenance, construction and repair of any pipes and appurtenances as may be reasonably necessary to avoid sewers, water pipes, conduits in other structures lawfully in or under the streets; and before the work of maintenance, construction or repairs of any pipes and appurtenances is commenced, the grantee shall file with the City plans showing the location thereof, which shall be subject to the approval of the City Council. All such

construction shall be subject to the inspection of City Manager and City Engineer and done to his reasonable satisfaction.

(d) Nothing herein shall be deemed to make the City or its boards and commissions, officers, employees, agents or servants of the City responsible or liable to said grantee by reason of the approval of plans for the maintenance, construction, and repair of pipes or appurtenances. The City, by granting this franchise, does not warrant the accuracy of such approval or information as supplied or given to the grantee.

SECTION 15. *Further Construction of Pipeline.*

Any change in the alignment, size, length of pipeline or the throughput of the pipeline shall be deemed a material breach and a forfeiture of the franchise by grantee.

SECTION 16. *Prohibition Against Transfer.*

Grantee shall not assign, hypothecate or transfer this Ordinance or any interest therein directly or indirectly, by operation of law or otherwise without the prior written consent of the City; any attempt to do so without said consent shall be null and void, and any assignee, hypothecatee or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transferee.

SECTION 17. *Forfeiture.*

(a) In the event Grantee fails to comply with or to commence and diligently proceed towards compliance with any instructions of the City or any City officer having authority to so act with respect to maintenance of pipeline or repair of any damage to highways, streets, alleys or other public places, or any other public improvement as defined in Section 8, herein, within three (3) days after the service of written notice on the grantee requiring compliance therewith, then the City may immediately do whatever

work is necessary to carry out the instructions at the cost and expense of the Grantee, which cost, the grantee agrees to pay and shall pay upon demand.

(b) If the grantee of this franchise shall fail, neglect or refuse to comply with any of the provisions of this Ordinance and shall not within ten (10) days after written demand for compliance, begin the work of compliance, or after such beginning shall not prosecute the same with due diligence to completion, then the City may declare this franchise and all rights and privileges forfeited and upon written notice to grantee, this franchise shall be void and the rights of the grantee shall cease. Upon the termination of this franchise, whether by forfeiture or otherwise, the grantee shall be barred from further use of the public streets, alleys, roads, highways, and other public places of said City under this Ordinance.

SECTION 18. *Termination of Franchise.*

(a) At the time of the expiration, forfeiture or other termination of this franchise, or the permanent discontinuance of the use of its facilities, or any portion thereof, grantee shall make written application to the City for authority to either abandon all or a portion of such facilities in place or to remove all or a portion of such facilities. Thereupon the City shall determine whether any abandonment or removal which is thereby proposed may be effected without detriment to the public interest or under what conditions such proposal of abandonment or removal may be safely effected and shall then notify the Grantee according to such requirements as shall be specified in the City's order.

(b) Within ninety (90) days thereafter, grantee shall pursuant to such order of the City: (1) remove, at its sole cost or expense, all or a portion of such facilities or (2) abandon in place all or a portion of such facilities by sealing

and filling the same with either a mixture of cement and sand or rotary mud and "Cypan" in a manner satisfactory to the City and paying the City a sum equal to that set forth in Section 4 herein.

(c) If any facilities to be abandoned in place subject to prescribed conditions shall not be abandoned in accordance with all of such conditions, then the City Engineer may make additional appropriate orders, including if he or she deems desirable, an order that the grantee shall remove all such facilities. On the failure of the grantee to comply therewith, the City may cause said facilities to be removed at the grantee's expense, and the grantee shall pay to the City the actual cost thereof plus twenty (20%) percent for overhead.

SECTION 19. *Cumulative Remedies.*

No provision herein made for the purpose of securing the performance of the terms and conditions of this Ordinance shall be deemed an exclusive remedy, or to afford the exclusive procedure, for the enforcement of said terms and conditions, but the remedies and procedures herein provided, in addition to those provided by law, shall be deemed to be cumulative.

SECTION 20. *Notice.*

All notices, demands, requests, or approvals to be given under this Ordinance, shall be given in writing and conclusively shall be deemed served when delivered personally or on the second business day after the deposit thereof in the United States Mail, postage prepaid, registered, or certified, addressed as hereinafter provided.

All notices, demands, requests, or approvals from Contractor to City shall be addressed to City at:

Santa Monica City Hall
1685 Main Street
Santa Monica, California 90401
Attn: City Attorney

All notices, demands, requests, or approvals from City to Contractor shall be addressed to grantee at:

Shell Oil Company
Operations/Pipelines
West Coast Division
P. O. Box 4848
Anaheim, California 92803

21. *Costs of Litigation.*

If any legal action is necessary to enforce any provision hereof or for damages by reason of an alleged breach of any provisions of this Ordinance, the prevailing party shall be entitled to receive from the losing party all costs and expenses and such amount as the court may adjudge to be reasonable attorney's fees for the costs incurred by the prevailing party in such action or proceeding.

SECTION 22. *Counterparts.*

This Ordinance may be executed in several counterparts, each of which is an original, and all of which together constitute but one the same document.

SECTION 23. *Captions For Convenience.*

The captions herein are for convenience and reference only and are not a part of this Ordinance and do not in any way limit, define, or amplify the terms and provisions hereof.

SECTION 24. *Governing Law.*

This Ordinance has been made and shall be construed and interpreted in accordance with the laws of the State of California.

SECTION 25. *Acceptance of Franchise.*

The acceptance of this franchise by the Grantee must be filed within 10 days after adoption of this Ordinance. Upon the filing of each acceptance, and provided this Ordinance has become effective, all franchise and privileges heretofore granted to the Grantee or its predecessors in interest in respect to the pipeline located in public streets within the City of Santa Monica shall terminate.

SECTION 26. *Execution.*

The Mayor shall sign and the City Clerk shall attest to the passage of this Ordinance. The City Clerk shall cause the same to be published once in the official newspaper within 15 days after its adoption. The ordinance shall become effective 30 days from its adoption.

IN WITNESS WHEREOF the parties hereto have executed this Ordinance on this _____ day of _____, 1982.

City of Santa Monica

John H. Alschuler
City Manager

Approved as to form:

ROBERT M. MYERS
City Attorney

Shell Oil Company,
A Delaware Corporation

By _____

